

ISSUE DATE: December 22, 1998

DOCKET NO. E-002/M-98-988

ORDER DENYING RECONSIDERATION ON THE MERITS

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey  
Joel Jacobs  
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Gregory Scott

Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of the Petition of Northern States  
Power Company for Approval of the Koch  
Refining Company Distribution and  
Transmission Service Tariff

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**PROCEDURAL HISTORY**

On September 29, 1998 the Commission issued its ORDER APPROVING AGREEMENT UNDER MINN. STAT. § 216B.1621 in this case. On October 19, 1998 Northern States Power Company, one of the parties to the agreement, filed a petition for reconsideration.

On October 29, 1998 Koch Refining Company, L.P. (Koch), the Residential Utilities Division of the Office of the Attorney General (RUD-OAG), and the Department of Public Service (the Department) filed replies. Koch and the RUD-OAG opposed reconsideration. The Department reiterated its position that a related dispute between Koch and NSP regarding the recovery of conservation expenses should be resolved through arbitration.

On December 7, 1998 the Commission issued an Order granting reconsideration for the sole purpose of tolling the 60-day statutory deadline for acting on petitions for reconsideration. All parties concurred in the issuance of the tolling Order, to resolve a scheduling conflict facing Northern States Power Company.

The petition came before the Commission on the merits on December 9, 1998.

**FINDINGS AND CONCLUSIONS**

**I. Statutory Background**

Minn. Stat. § 216B.1621 is designed to promote the efficient use of existing generation and the development of efficient future generation. In brief, it permits electric utilities to offer advantageous service arrangements to large customers proposing to build their own generating

facilities, in order to defer construction of those facilities until the public utility can use their output. To qualify, proposed facilities must meet stringent efficiency requirements.

Service arrangements negotiated under this section are not subject to existing tariff provisions, statutory ratemaking principles, or public interest review by the Commission.

The Commission must approve electric service agreements negotiated under the section if the following things are true:

(1) the proposed electric service power generation facility could reasonably be expected to qualify for a market value exclusion under section 272.0211 [a statute granting favorable tax treatment to generating facilities meeting specified efficiency standards];

(2) the public utility has a contractual option to purchase electric power from the proposed facility;

(3) the public utility can use the output from the proposed facility to meet its future need for power as demonstrated in the most recent resource plan filed with and approved by the commission under section 216B.2422.

Minn. Stat. § 216B.1621, subd. 2.

## **II. Factual Background**

On February 4, 1997 the Commission issued an Order approving an electric service agreement between Northern States Power Company (NSP) and Koch Refining Company, L.P. (Koch) under Minn. Stat. § 216B.1621.<sup>1</sup>

In that agreement Koch agreed to defer construction of a cogeneration facility at its Pine Bend refinery, NSP acquired an option to purchase power from the facility whenever it was built, and both parties agreed on pricing for generation services provided to Koch over the life of the contract. The agreement also required NSP to file and secure Commission approval of a “tariff” setting itemized prices for other services provided to Koch over the life of the contract -- transmission, distribution, and ancillary services -- and setting energy loss factors.

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<sup>1</sup> In the Matter of the Petition of Northern States Power Company for Approval of an Electric Supply and Power Purchase Option Agreement Between NSP and Koch Refining Company, L.P., Docket No. E-002/M-96-1123, ORDER APPROVING AGREEMENT (February 4, 1997).

On July 1, 1998 NSP made the required filing. Koch opposed several of its terms, but the two parties reached agreement on all terms at the September 17, 1998 hearing and urged the Commission to approve the document as modified and submitted at the hearing. The Commission issued an Order finding that the document was an agreement under Minn. Stat. § 216B.1621 and approving it thereunder.

### **III. The Issue**

The issue is whether the Commission should reconsider its finding that the document it approved in the September 29 Order was an agreement under Minn. Stat. § 216B.1621 and not a tariff.

### **IV. Positions of the Parties**

#### **A. NSP**

NSP did not challenge the approval of the document submitted by itself and Koch at the September 17 hearing and did not challenge any of its terms. The Company did challenge the Order's characterization of the document as an agreement under Minn. Stat. § 216B.1621 instead of a tariff.

First, NSP claimed that Minn. Stat. § 216B.1621 applied only to electric supply, not to transmission and distribution, which were the subject of the document submitted by the parties on September 17. Those services, according to the company, were unaffected by the statute and should be treated as tariffed services subject to traditional rate-of-return regulation.

The Company claimed that treating transmission and distribution as services subject to § 216B.1621 and therefore outside the Commission's jurisdiction raised doubts about the Commission's ability and intention to exercise jurisdiction over other important matters, such as service quality and billing practices.

The Company also claimed that the parties had *agreed* that distribution and transmission rates would be set by tariff, that the Commission had approved that agreement, and that that approval rendered the document setting transmission and distribution prices a tariff.

Finally, the Company argued that there was no record support for the Commission's findings that the two companies continued to meet the statutory requirements to enter into a § 216B.1621 contract.

#### **B. Koch**

Koch argued that the statute applied to electric service in general, including its transmission and generation components; that calling the document an agreement instead of a tariff did not affect Commission jurisdiction over matters not specifically exempted from Commission jurisdiction under § 216B.1621; and that, under principles of *res judicata*, the parties were bound by the

Commission's original finding that they met the statutory criteria to enter into a § 216B.1621 agreement, eliminating any need for new record evidence on that issue.

### **C. Residential Utilities Division of the Office of the Attorney General**

The Residential Utilities Division of the Office of the Attorney General claimed that NSP's purpose in calling the document a tariff instead of an agreement was to affect the outcome of the arbitration of its dispute with Koch regarding the recovery of conservation expenses, through the application of the filed rate doctrine. The agency also denied that calling the document a § 216B.1621 agreement jeopardized the Commission's ability to take jurisdiction over matters not exempted from Commission jurisdiction under that statute.

### **D. The Department of Public Service**

The Department of Public Service reiterated its belief that the dispute between Koch and NSP regarding the recovery of conservation expenses should be resolved in arbitration.

## **V. Commission Action**

For the reasons set forth below, the Commission will not reconsider its decision that the document agreed to and submitted by NSP and Koch at the September 17 hearing is an agreement under Minn. Stat. § 216B.1621, not a tariff.

### **A. The Statutory Language**

First, the document is an "agreement" as that term is used in everyday speech. At the September 17 hearing NSP and Koch *agreed* to the terms and conditions set forth in the document, and the document does govern a transaction permissible only under Minn. Stat. § 216B.1621. At the most basic level, then, the Commission views its decision as well founded.

Second, the Commission rejects the claim that § 216B.1621 applies only to electric supply, not to the transmission and distribution services necessary to deliver that supply. The statute speaks of large customers intending to construct generating facilities to meet "all or part of the customer's electric service needs. . ." "Electric service" is a term used throughout the Public Utilities Act to refer not just to raw electricity, but to the transmission and distribution services necessary to deliver the electricity to the customer in usable form.<sup>2</sup> The Commission concludes that transmission and distribution services are proper subjects for agreements under Minn. Stat. § 216B.1621.

In fact, not only are they proper subjects for agreements under § 216B.1621, they are probably improper subjects for tariffs, since they are available as stand-alone services to retail customers only under § 216B.1621. Apart from that statute, the only form of electric service available to retail customers is the "bundled" variety (supply, transmission, and distribution) referred to

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<sup>2</sup> See, for example, the assigned service area statutes, Minn. Stat. §§ 216B.37-43, which consistently use the term "electric service" to refer to the "bundled" service -- electricity, transmission, and distribution -- provided by electric utilities.

throughout the rest of the Public Utilities Act. There are no existing tariffs for retail transmission and retail distribution services because there are no such services.

Since these services are available only under § 216B.1621, and since § 216B.1621 explicitly excludes the application of all potentially applicable Minnesota ratemaking and tariff filing statutes, it would be anomalous to label the document governing the terms and conditions under which NSP will supply these services to Koch a tariff.

#### **B. Future Jurisdictional Issues**

The Commission does not share NSP's concern that calling the document at issue an agreement rather than a tariff will signal that the Commission has forfeited its authority over service quality, billing and collection, and other matters the Legislature expects it to continue to regulate. The Commission will continue to regulate all aspects of the NSP/Koch relationship not exempted from regulation under § 216B.1621. Classifying this agreement as a tariff, however, would be an unnecessarily indirect, clumsy, and confusing way to send that message.

#### **C. The Significance of Having Approved the First Agreement**

The Commission also rejects the claim that its approval of the original NSP/Koch agreement, in which the parties agreed that NSP would file a "tariff" setting transmission and distribution prices for Commission approval, required the Commission to call the document submitted at the September 17 hearing a tariff.

First, the Commission did not review the original agreement for proper characterization of documents to be filed later and in fact lacked the authority to reject the agreement on that basis. Under the statute the Commission must approve agreements if the three findings set forth in § 216B.1621, subd. 2 are made.

Second, the parties lacked the authority to determine the legal status and effect of a subsequently filed document setting prices for transmission and distribution services. No matter how they characterized the document in their original agreement, they did not have the authority to convert an agreement to a tariff by labeling it a tariff in their contract.

#### **D. Continuing Validity of Right to Contract Under § 216B.1621**

Finally, the Commission agrees with Koch that *res judicata* bars NSP's claim that there is no record evidence establishing that Koch qualifies for a § 216B.1621 exemption from normal

retail rate requirements. That issue was decided in docket E-002/M-96-1123, when the original agreement was approved, and it need not be reexamined each time the parties amend, clarify, or supplement that long term agreement.<sup>3</sup>

**E. Conclusion**

For all these reasons, the Commission will deny NSP's petition for reconsideration on the merits.

**ORDER**

1. Northern States Power Company's petition for reconsideration is denied on the merits.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

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<sup>3</sup> In the Matter of the Petition of Northern States Power Company for Approval of an Electric Supply and Power Purchase Option Agreement Between NSP and Koch Refining Company, L.P., Docket No. E-002/M-96-1123, ORDER APPROVING AGREEMENT (February 4, 1997).